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No. 90-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN J. DILLON III and ROBERT D. HAASE,

Petitioners,

vs.

ALLEGHANY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review two orders denying Petitioners' motions to vacate a non-final decision and order of the Court of Appeals, where a live controversy existed when the Court of Appeals decision was entered but the controversy became moot before Petitioners' time to seek review in this Court had elapsed?

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JOHN J. DILLON III and ROBERT D. HAASE,

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On Petition For A Writ of Certiorari
To The United States Court of
Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Alleghany Corporation

informed this Court by letter dated

January 17, 1991 that "Alleghany has no current interest in the subject matters of the pending Petition and expressly waives its right to respond to the Petition . . . ." The Court nonetheless directed the Clerk to request a response from Alleghany, as set forth in a letter dated January 30, 1991 from Joseph F. Spaniol, Jr., Clerk.

STATEMENT PURSUANT TO RULE 29.1

Alleghany Corporation owns all the outstanding common stock of its direct subsidiaries. The Shelby Insurance Company ("Shelby"), an indirect subsidiary of Alleghany, has a class of preferred stock which is publicly held.

STATEMENT OF THE CASE

In 1988, Alleghany Corporation ("Alleghany") announced its intention to acquire up to 20 percent of the common stock of The St. Paul Companies, Inc. ("St. Paul"), a holding company incorporated in Minnesota with multiple insurance subsidiaries in several states. Insurance Commissioners (or comparable authorities) in 10 states, including Indiana and Wisconsin, each took the position that Alleghany could not purchase more than 10 percent of the outstanding St. Paul common stock without receiving their prior approval. [A-7].

When the Indiana and Wisconsin Commissioners denied Alleghany's applications for permission to purchase additional St.

Paul stock, Alleghany initiated federal court actions challenging the applicable Indiana and Wisconsin statutes on federal constitutional grounds. The United States District Court for the Western District of Wisconsin dismissed Alleghany's action under the abstention doctrine identified with Younger v. Harris, 401 U.S. 37 (1971), and Alleghany appealed. [A-33, 35]. The United States District Court for the Southern District of Indiana denied the Indiana Commissioner's motion to dismiss on Younger grounds, and the Court of Appeals agreed to review that interlocutory decision pursuant to 28 U.S.C. § 1292(b). [A-118].

The Indiana and Wisconsin appeals were consolidated for briefing and disposition. [A-28]. On February 21, 1990, the United States Court of

Appeals for the Seventh Circuit ruled that the federal courts were not required to abstain under the Younger doctrine, reversing the Wisconsin district court and affirming the Indiana district court. [A-5, 20]. In related appeals arising out of similar challenges to the applicable North Dakota and Nebraska statutes, the Eighth Circuit arrived at the opposite conclusion regarding Younger abstention on February 27, 1990. See Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990); Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990). [A-132].

Before any further proceedings on the merits in the district courts, Alleghany sold its St. Paul holdings to St. Paul at market plus an allowance toward Alleghany's legal expenses, and agreed

to discontinue the litigation and certain state administrative proceedings. [A-140-41]. The Indiana action was dismissed as moot on July 18, 1990; the Wisconsin action was dismissed as moot the next day. [A-115, 31].

The Indiana and Wisconsin Commissioners, respectively, filed motions in the Seventh Circuit on July 16 and 20, 1990, requesting that the Seventh Circuit vacate its non-final decision and order dated February 21, 1990 regarding Younger abstention. The Seventh Circuit denied those motions by orders dated July 19 and 23, 1990. [A-1, 3]. Petitioners seek review of the July orders.

SUMMARY OF THE ARGUMENT

Respondent Alleghany, which discontinued its efforts to acquire

additional St. Paul stock three months after the Seventh Circuit handed down its abstention decision, has no concrete interest in the subject matter of the pending Petition. Accordingly, there is no case or controversy with respect to Alleghany. The absence of a truly adverse party counsels against selecting this case for review.

REASONS FOR DENYING THE WRIT

This case is moot as to Alleghany, which has no concrete interest, pecuniary or otherwise, in the procedural issue raised by Petitioners: whether the rule stated in United States v. Munsingwear, 340 U.S. 36 (1950), imposes a "mandatory duty" on the court of appeals to vacate a non-final order in a matter that becomes moot before the time for

seeking review in this Court has elapsed. [Petition at 10].

Any discussion of the merits of Petitioners' argument in this Response would not reflect the views of an adverse party vigorously seeking to preserve the fruits of a lower court victory. However, since the Court directed the Clerk to request that Alleghany submit a Response to the Commissioners' Petition, it submits this Response, which is limited to a discussion of the procedural aspects of the case which may influence the Court's decision whether to grant review.

The most important procedural aspect, of course, is that no party except the Petitioners has any current interest in the outcome of the dispute. In many cases, the party who prevails in the lower courts in a case

that becomes moot on its way to this Court will have a concrete interest in the outcome of his adversary's motion to vacate. The Munsingwear case itself provides a clear example. Munsingwear, as the defendant below, had prevailed in an injunction action brought by the United States. Munsingwear therefore had a significant interest in preserving the collateral estoppel effect of the unvacated final judgment because a separate action for damages had been initiated by the United States arising out of the same conduct.

Unlike the respondent in the Munsingwear case, Alleghany does not expect that it will again be litigating with either Petitioner over the legal issue resolved by the Seventh Circuit. In some later case similar to Munsingwear a respondent

may come before this Court with an interest in preserving the unvacated lower court decision. Such a case would provide a better opportunity to review the question posed in the Petition.

Moreover, when Petitioners attempt to identify the "collateral consequences" which flow from the Younger abstention decision in this case, they cite only a district court opinion respecting the precedential value of the February 21, 1990 Seventh Circuit abstention decision. See Hinrichs v. Goodrich, No. 90-C-0072-C (W.D. Wis. Nov. 30, 1990) (reproduced in Appendix at A-145). The Hinrichs decision does not even mention collateral estoppel -- in stark contrast with the Munsingwear case, which this Court described as "a case which falls squarely within the

classic statement of the rule of res judicata . . . ." See Munsingwear, 340 U.S. at 58.

Finally, Petitioners assert that their primary concern is the lingering impact of a Seventh Circuit abstention analysis "that significantly erodes the ability of the states to have other kinds of cases or controversies decided in their own courts." [Petition at 11]. The materials in Petitioners' Appendix illustrate that the unvacated Seventh Circuit decision is not the true source of Petitioners' concern. The Seventh Circuit's February 21, 1990 decision, and the Wisconsin district court's decision in the Hinrichs case cited by Petitioners, recognized that the abstention decision in the present case "was foreshadowed" in prior Seventh Circuit decisions. See

Hinrichs at A-153; Alleghany Corp. v. Haase, 896 F.2d 1046, 1053 (7th Cir. 1990) (reproduced at A-19) (both citing Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1983).

If Petitioners' actual concern, as they suggest, is with the Seventh Circuit's abstention holding and its possible "collateral consequences," that issue can be addressed in a more direct manner. The Hinrichs case itself may find its way to this Court. Because collateral estoppel was neither argued nor applied in the Hinrichs case, the abstention issue remains alive for eventual Supreme Court review. The issue ostensibly raised by the present Petition -- whether "[u]nder Munsingwear, the Seventh Circuit therefore had a mandatory duty to grant the states' request to vacate"

-- should await a case that more closely resembles Munsingwear, including the participation of an adversary who has an interest in whether the lower court's decision is vacated and the existence of an unvacated final judgment which has collateral effects that are clear rather than speculative.

CONCLUSION

Although Alleghany neither opposes nor seeks the issuance of a writ of certiorari to the Seventh Circuit to review its orders declining to vacate the February 21, 1990 abstention decision, cf. Sup. Ct. R. 15.1; Sup. Ct. R. 24.1(j), Alleghany respectfully submits that the absence of a live controversy and the absence of a final judgment with clear collateral estoppel effect should preclude review in this case. If review is granted, however, Alleghany respectfully requests that it be dismissed as a Respondent. Because the instant action no longer presents a live case or controversy as to Alleghany, Alleghany does not intend

to submit further briefs herein unless advised that it is required to do so.

Dated: New York, New York
February 28, 1991

Respectfully submitted,

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